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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 179

FARBWERKE vormals MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, and BADISCHE-ANILIN & SODA-FABRIK,
Petitioners,

against

CHEMICAL FOUNDATION, INC.; E. I. duPONT deNEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States,
Respondents.

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BRIEF FOR PETITIONER FARBWERKE VORMALS MEISTER LUCIUS & BRUNING.

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OPINIONS BELOW.

The opinion of the District Court (R. 136) is reported in 29 F. (2d) 597. The opinion of the Circuit Court of Appeals (R. 181) is reported in 39 F. (2d) 366.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA § 347 (*a*)). The decrees of the Circuit Court of Appeals for the Third Circuit were entered on March 4, 1930 (R. 195, 196, 197) and the Petition for Certiorari filed June 4, 1930 and granted by orders entered October 13, 1930 (R. 201, 202).

THE QUESTION PRESENTED.

May the Petitioners, the former enemy owners of patents (hereinafter collectively called the German owners) seized under the Trading with the Enemy Act (40 Stat. 411), as amended, under instruments of seizure, which did not in express terms seize the royalties accrued under wartime licenses granted by authority of the President pursuant to the provisions of said Act, which patents were subsequently sold by the Alien Property Custodian pursuant to the provisions of said Act and the amendments thereof, recover such accrued royalties either under said Act, as originally enacted, or under the amendment thereof made by the Settlement of War Claims Act of March 28, 1928 (45 Stat. 277), in suits brought within the time specified in said Act?

THE STATUTES.

The pertinent provisions of the Trading with the Enemy Act (Act of Oct. 6, 1917, C. 106, 40 Stat. 411, 50 USCA Append. pp. 1?9-311), as enacted and as amended are as follows:

Section 7, subsection (*c*) as enacted October 6, 1917:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Section 7, subsection (*c*), as amended Nov. 4, 1918 (ch. 201, § 1, 40 Stat. 1020):

"If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of

this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

Section 10, subsections (*c*), (*d*), (*e*) and (*f*) as enacted October 6, 1917:

"(*c*) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding $100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print,

label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (*f*) hereof:

"(*d*) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (*f*) of this section, or upon the direction of the alien property custodian.

"(*e*) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violation by the licensee of any of the provisions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him.

"(*f*) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expira-

tion of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label or copyrighted matter; *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

"If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on

possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable."

The following paragraph was added to 10(*f*) by section 19 of Settlement of War Claims Act of 1928 (Act of March 10, 1928, ch. 167, sec. 19; 45 Stat. 277):

"In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred, or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright was seized or otherwise acquired by the Alien Property Custodian.

Section 10(*g*) as enacted October 6, 1917:

"(*g*) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts."

Section 12 as enacted October 6, 1917:

"All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

"The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect properly on deposit, such bonds to be conditioned as he may direct.

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property, or rights so sold by him.*

"Any money or property required or authorized by the provisions of this Act to be paid, conveyed, trans-

*The foregoing paragraph was amended March 28, 1918. For text of the amendment see p. 11 *post*.

ferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further,* That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee."

Section 12, fourth paragraph,* as amended March 28, 1918 (ch. 28, § 1, 40 Stat. 460):

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the

*For text of this paragraph as originally enacted see p. 10 *supra.*

President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such proprty or rights so sold by him."

STATEMENT.

At the outbreak of the War petitioners, citizens of Germany, were severally the owners of certain United States letters patent (R. 69-70, 130-1).

Trading with the Enemy Act (Sec. 10(*c*), *supra*, pp. 5-6) authorized the granting of licenses for the use of enemy-owned United States letters patent and the payment of reasonable royalties for such use, to be fixed as provided in the Act and to be recoverable by the owners of such patents upon the filing of bills in equity after the end of the War and until the expiration of one year thereafter (Sec. 10(*f*), *supra*, pp. 6-8). The power to grant such licenses was delegated by the President to the Federal Trade Commission (R. 70-1, 131-2). Pursuant to such authority, respondent E. I. duPont deNemours & Co. (hereinafter referred to as duPont) was licensed under Federal Trade Commission License No. 19 to use said patents (R. 27-34, 70-1, 131-2). The patents were subsequently seized by the Alien Property Custodian (R. 71-2, 132-3) and thereafter sold and assigned to respondent Chemical Foundation, Inc., on April 10, 1919 (R. 73, 134). Neither the instruments of seizure (R. 75-81) nor the assignment (R. 81-85) expressly covered the accrued royalties.

Within a year after the termination of the War, the German owners, severally, brought suits against duPont to recover reasonable royalties pursuant to Section 10(*f*) of the Trading with the Enemy Act (R. 135-6). Within the same period Chemical Foundation brought suit

against duPont for the recovery of reasonable royalties for the use of the same patents from the date of the assignment of the patents by the Alien Property Custodian to it, namely, April 10, 1919, to the date when the license was cancelled (R. 11, 74).

By its bill of complaint and by stipulation (R. 11, 75) Chemical Foundation makes no claim for royalties which had accrued prior to the assignment of the patents to it. The German owners, as correctly stated by the court below (R. 186), expressly limited the relief sought by them to such royalties as had accrued prior to such assignment. The three suits of the German owners and that of the Chemical Foundation, Inc. were consolidated for trial (R. 44-5).

By Section 19 of the Settlement of War Claims Act of 1928 (Act of March 10, 1928, ch. 167, Sec. 19; 45 Stat. 277), Section 10(*f*) of Trading with the Enemy Act was amended by the addition of a paragraph (*supra*, p. 8) in which it was provided that in the case of any patent seized by the Alien Property Custodian:

> "* * * any suit brought under this subsection (10f) within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, * * * if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label or copyright was seized or otherwise acquired by the Alien Property Custodian."

The District Court following the decision of the Circuit Court of Appeals for the Third Circuit in *Hicks* v. *Anchor Packing Co.*, 16 F. (2d) 723, held that the German owners although the owners of the patent within the meaning of Section 10(*f*) of Trading with the Enemy Act, as originally enacted, could not, by reason of the subsequent seizure and sale of their patents, maintain suits for the recovery of royalties during the period of their ownership, that the amendment of such section by Settlement of War Claims Act was unconstitutional, and dismissed the bills of the German owners (R. 136-148, 152-5). In the Chemical Foundation suit, consolidated for trial with the suits of German owners, the decree entered by the District Court declared Chemical Foundation to be the owner of the royalties, which had accrued prior to the seizure and sale of said patents, as well as thereafter (R. 149-51), although, in its bill of complaint, it had asserted no such right and although no issue in respect thereof was joined in said case between the German owners and the Chemical Foundation.

On appeal the Circuit Court of Appeals affirmed holding (1) that the theretofore accrued royalties as well as the patents themselves were seized by the Alien Property Custodian, (2) that the German owners were not the owners of the patents within the meaning of the Act, and (3) that the amendment of 1928, if applied to these cases, was unconstitutional (R. 181-195).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

1. In holding that the accrued royalties were seized.

2. In holding that only such persons who were the owners of patents at the time of the institution of suits, could bring such suits for the recovery of accrued royalties under Trading with the Enemy Act.

3. In holding that the amendment of Section 10(*f*) of Trading with the Enemy Act by Section 19 of Settlement of War Claims Act of 1928 was, as applied to the facts of this case, unconstitutional.

4. In affirming the decree of the District Court dismissing the petitioners' several bills and in affirming so much of the decree in the Chemical Foundation suit as found it to be the owner of the accrued royalties.

ARGUMENT.

I. The accrued royalties were neither seized nor sold.

The patents were seized under subsection (*c*) of Section 7 as amended November 4, 1918 (again reproduced for convenience), which provided:

> "If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.
>
> "Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded *shall impart the same no-*

> *tice and have the same force and effect as a duly executed conveyance, transfer, or assignment* to the Alien Property Custodian so filed, registered, or recorded."

Congress thus intended that the seizure should be evidenced by a "requirement" or written instrument, which, in the case of patents, should "have the same force and effect as a duly executed . . . assignment . . ." The President delegated the power conferred to the Alien Property Custodian, by whom the patents were seized. The "requirement" or instrument of seizure in respect of each* covered

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*The instrument of seizure in respect of Patent No. 868,294, owned by the petitioner, in whose behalf this brief is filed, dated and recorded March 26, 1919 (R. 79-80), was in the following form, the two other instruments by which the patents of the other petitioners were seized being substantially similar (R. 75-79):

DEMAND FORM (3)

Trust No. 12079
Report No. 38124

PATENT OWNED BY ENEMY SUBJECT TO THE RIGHTS OF OTHERS.

E. I. Du Pont de Nemours & Company,
Wilmington, Delaware

H. A. Metz Laboratories, Inc.,
New York, N. Y.

To The Commissioner of Patents,
Washington, D. C.

To All to Whom These Presents May Come:

I, FRANCIS P. GARVAN, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading With the Enemy Act," approved October 6, 1917, and the amendments thereto and the executive orders and proclamations issued in pursuance thereof, under and by virtue of the authority vested in me as Alien Property Custodian, after investigation, do determine that

"said letters patent and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof."

Farbwerke vorm. Meister, Lucius & Bruning,
Hochst-on-the-Main, Germany

is an enemy not holding a license granted by the President within the purview of said Act as amended and said orders and proclamations; and I do further, after investigation, determine that certain letters patent of the United States, identified as follows:

Patent No.	*Date of Issue*	*Title*
868,294	Oct. 15, 1907	Process of producing Phenyglycin and its homologues

and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof, subject to the rights of

E. I. Du Pont de Nemours & Company
Wilmington, Delaware

belongs to, or is held for, or on account of, or on behalf of, or for the benefit of said enemy,

Farbwerke vorm. Meister, Lucius & Bruning,
Hochst-on-the-Main, Germany

As such Alien Property Custodian I do seize said letters patent and every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof, subject to the rights of

E. I. Du Pont de Nemours & Company
Wilmington, Delaware

and I hereby require that you convey, transfer, assign and deliver the same to me, to be by me, as Alien Property Custodian, held, administered and accounted for as provided by law.

I, as Alien Property Custodian, do request that the Commissioner of Patents record this requirement upon the books and records kept by him, to show the assignment and transfer of letters patent, in respect to said letters patent above mentioned.

It is well settled that the assignment of a patent and of "every right, title and interest with respect thereto" does not operate to transfer to the assignee either accrued royalties or the right to recover past damages or profits for infringement, but that the same must be expressly

---

This demand is supplementary to any and all requirements and demands heretofore made with respect to said property and is in addition to and without prejudice to such requirements and demands, and shall in no way affect the interests, rights and powers acquired by me as Alien Property Custodian by virtue of such previous requirements and demands.

Witness my hand and seal of office this 22nd day of March, 1919.

FRANCIS P. GARVAN
Alien Property Custodian.

Service of the foregoing demand is hereby acknowledged, this 26th day of March, 1919.

R. F. WHITEHEAD
Acting Commissioner of Patents 485.

Recorded March 26, 1919.

2-392

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Received and Recorded on the 26th day of March, 1919 in Liber Z 106, page 301 of Transfers of Patents.

IN TESTIMONY WHEREOF, I have caused the seal of the Patent Office to be hereunto affixed.

JAMES T. NEWTON
Commissioner of Patents

Exd
LLW
6-1697

The instruments of seizure in respect of the other patents belonging to the other petitioners, dated and recorded February 21, 1919 and March 26, 1919, respectively (R. 75-79), were identical in form except that the instrument recorded February 21, 1919 did not include the words "subject to the rights of E. I. Du Pont de Nemours & Company, Wilmington, Delaware".

assigned. *Moore* v. *Marsh*, 7 Wall. 515, 522; *United States* v. *Loughrey*, 172 U. S. 206, 211, 212; *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24; *Superior Drill Co.* v. *Nye Mfg. Co.*, 98 Fed. 734; *Canda Bros.* v. *Michigan Malleable Iron Co.*, 152 Fed. 178; *Johnston* v. *Southern Well Works*, 208 Fed. 145; *Dibble* v. *Augur*, 7 Blatch. 86 (91), Fed. Cas. No. 3,879; *May* v. *Juneau*, 30 Fed. 241; *Kaolatype Engraving Co.* v. *Hoke*, 30 Fed. 444; *Emerson* v. *Hubbard*, 34 Fed. 327; *Jones* v. *Berger*, 58 Fed. 1,006; *Leadam* v. *Ringgold Co.*, 140 Fed. 611; *Herman* v. *Detroit Shipbuilding Co.*, 295 Fed. 423, 424.

Construed according to the law governing assignment of patents, the accrued royalties were excluded from the instrument of seizure, and the right to recover damages and profits for infringements were included only because specifically mentioned. This the court below recognized (R. 189-90) but held that such royalties were nevertheless seized because it was said that the court was dealing not with a voluntary assignment but with "an act of capture".

In so holding, it is respectfully submitted that the court misinterpreted both the statute, under which the patents were seized, and the instrument of seizure itself. The second paragraph of the statute (*supra* p. 4) expressly provides that the instrument of seizure, referred to therein as a "requirement", shall in the case of patents (which are expressly included in the first paragraph as among the classes of property subject to seizure) "have the same force and effect as a duly executed * * * assignment" thereof. Congress thus clearly intended, if it did not expressly declare, that the force

and effect of such instrument should be determined by the law governing the assignment of patents. In holding that it should be otherwise construed, the court below disregarded the plain intent of Congress. The Act did not require the Alien Property Custodian to seize all of the property of an enemy owner but authorized the Custodian to qualify or limit the seizure in such manner and to such extent as he might in any case see fit. *Sutherland* v. *Guaranty Trust Company of New York,* 11 F. (2d) 696, 698 (2d C. C. A.). The extent of the seizure must be determined by the words of the instrument of seizure construed in the light of the law governing assignments of patents. Otherwise, the instrument of seizure does not have the same force and effect as an assignment, but a force and effect different therefrom.

Moreover, the express inclusion of damages and profits for past infringement, which under the law governing the interpretation of assignments would not otherwise have been included, and the exclusion of any reference to the accrued royalties is clearly indicative of an intent to exclude the latter. If, as asserted by the court below, the words "every right, title and interest with respect thereto" were effective to seize the accrued royalties, they were equally effective to seize the right to recover damages and profits for past infringement and no specific mention thereof was required. The instrument of seizure was evidently carefully drawn by a draughtsman familiar with the law governing the assignment of patents, and in conformity therewith. The very statute, under which the patents were seized, reserved to the enemy owner the right to the payment of reasonable royalties for their use under licenses granted by authority

of the President (Section 10(*f*), p. 6 *supra*), by implication reserved to the enemy owner the right to recover damages and profits for past infringement (Section 10(*c*), pp. 5-6, *supra*) and expressly reserved in such enemy owner the right to institute and prosecute suits in equity "against any person other than a licensee * * * to enjoin infringement * * * in the same manner and to the same extent that he would be entitled to do if the United States was not at war" (Section 10(*g*), p. 8, *supra*). The seizure was of necessity made with full knowledge, that, except as affected by the scope of the instrument of seizure, the rights thus existing in the enemy owner would continue. Such instrument was obviously drawn on the correct hypothesis that the reserved right to enjoin infringement, *during the war*, was cut off by the seizure of the patent itself, but that the right to recover either profits or damages for past infringement, or the royalties already accrued under presidential licenses (the latter to be exercised only in suits to be brought *after* the termination of the war) would continue in the enemy owner unless seized along with the patent. Hence the express seizure of the former. If it had been intended to cover the accrued royalties as well as such damages and profits, specific mention of both would have been made.

Moreover, the instrument by which the patent belonging to the petitioner, in whose behalf this brief is filed, (footnote, pp. 18 and 19, *supra*) was expressly subject to the rights of duPont as licensee thereof under a presidential license. That is to say, the instrument of seizure discloses on its face actual knowledge of the existence of such license and hence of the existence of the right to

recover the royalties already accrued thereon in suits to be brought after the termination of the war. The express seizure of damages and profits for past infringement, and the omission expressly to seize accrued royalties under such license is thus all the more significant. Under the rule of *expressio unius, exclusio alterius,* the instrument of seizure on its face clearly excluded the accrued royalties.

Aside from its reference to the act of seizure as one of capture, the only reason assigned by the court below for its decision is that "the words 'every right, title and interest with respect to' the patents" on their face would include royalties which are said to be "a very real 'interest' in or in respect to a patent". But the same observation might have been made in respect of the cases cited above, construing assignments, and was no less applicable to "damages and profits for past infringement", which were expressly seized.

In *Crown Die & Tool Co.* v. *Nye Tool & Machine Works, supra,* the decision of Judge Blatchford in *Dibble* v. *Augur, supra,* is cited with approval, the opinion also commenting on the fact that Judge Blatchford "subsequently became a justice of this Court and had great experience in the administration of the patent law." The *Dibble* case may, therefore, be regarded as one of the leading cases on the subject. In that case, Judge Blatchford said:

> "* * * In conveying all of Robertson's *'right, title, interest, claim or demand whatsoever, in, to or under'* the patent, it conveys only the right to claims for infringements which should be committed after such assignment. (*Moore* v. *Marsh,*

> 7 Wall. 515.) The words *'claim or demand whatsoever, in, to or under'* the patent, are not sufficient to cover claims for past infringements. * * *" (pp. 90-91).

The words all "right, title, interest, claim or demand in, to, or under a patent" construed in the foregoing case are clearly as all embracing as the words "every right, title and interest with respect to" a patent. That the right to recover for past damages or for royalties does not inhere in the patent itself, likewise appears from the opinion of the late Chief Justice in *Superior Drill Co.* v. *Nye Mfg. Co., supra,* in which it is said:

> "* * * Claims for damages for past trespasses [in respect of a patent] do not pass by any conveyance of the thing trespassed upon. They are mere choses in action, independent of the thing injured, which pass to the administratrix as such, and which must be specifically assigned if they are to pass with the patent."

Accrued royalties are even more independent of the patent, itself. A suit for the recovery of royalties is not a suit arising under the patent laws over which the Federal courts have exclusive jurisdiction, but one for the enforcement of contract rights in which the sole jurisdiction is in the state courts, except where Federal jurisdiction may be invoked on the ground of diverse citizenship. *Crown Company* v. *Nye Tool Works, supra, Albright* v. *Teas,* 106 U. S. 613; *Pratt* v. *Paris Gas Light & Coke Co.,* 168 U. S. 255. It is true, that the power to exact royalties in the first instance grows out of the patent, but

the royalties themselves do not arise thereunder but out of the license under which they accrue. In this case no voluntary agreement was entered into between the German owners and the licensee. The Government under its war power, however, had the undoubted power to grant such licenses, which when granted had the same force and effect as a contract between the German owners and the licensee. *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel et al.*, 289 Fed. 446, 451 (2nd C. C. A.).

The District Court was apparently of the opinion (R. 142) that, although the statute in terms provided for the granting of licenses and the payment of royalties, the licensee was in reality an infringer, and that hence the royalties were in fact damages for infringement, the right to recover which was seized. The Circuit Court of Appeals did not adopt this view, which is clearly erroneous. The statute itself expressly and carefully distinguishes between licensees and infringers. Section 10(*c*), *supra*, expressly grants to licensees under the statute immunity from suits for infringement while section 10(*g*), *supra*, as expressly authorizes the institution of suits by enemy owners against infringers. A person may not at the same time be a licensee and an infringer. In the exercise of the war powers Congress had full power to seize and dispose of enemy property. *United States* v. *Chemical Foundation*, 272 U. S. 1. This being so, it obviously had the power to authorize the granting of licenses without seizing the patent itself, and to confer upon the licensees the immunities from infringement which attach under a license. The greater power obviously includes the lesser. Congress, by carefully chosen phraseology,

sought to create the status of licensor and licensee of enemy owned patents, in order to provide for the lawful use of such patents in the prosecution of the War. Neither may it be doubted that Congress possessed this power.

Since the royalties accruing prior to seizure were never seized, they could not have been sold to the Chemical Foundation. Nor were they included within the subsequent assignment of the patents to it by the Alien Property Custodian, the language of which is substantially similar to that contained in the instrument of seizure and was likewise in express terms confined to the interest "acquired" by the Alien Property Custodian (R. 81).

That Congress did not intend that the seizure of a patent and of every right with respect thereto should, without more, operate to seize royalties accrued prior to the seizure, is further evidenced by the amendment of 1928, confirming the right of former enemy owners of seized patents to recover "royalties for the period prior to the sale" of such patents by the Alien Property Custodian. This amendment was passed as part of a comprehensive settlement of the claims growing out of the War as embodied in the Settlement of War Claims Act. It is to be noted that this amendment operates only in respect of royalties accruing prior to the sale of patents both seized and sold. If the mere seizure of the patent (without more) effected a seizure of the royalties as well, the amendment is rendered entirely nugatory, unless its effect was to divest the purchasers of such royalties from the Alien Property Custodian of the rights so acquired. The Settlement of War Claims Act and the Trading with the Enemy Act are not only statutes in *pari materia* and thus to be construed together, but the amend-

ment of the latter by the former may be properly regarded as a legislative interpretation thereof. This legislative interpretation, while not binding upon this Court, is entitled to great weight. *Cope* v. *Cope*, 137 U. S. 682, *United States* v. *Stafoff*, 260 U. S. 477, *United States* v. *Morton*, 65 Fed. 204, *Board of Commissioners* v. *Alexander*, 58 Okla. 128.

In *Cope* v. *Cope*, 137 U. S. 682, 688, Mr. Justice Brown said:

> "These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones."

By the passage of this amendment Congress in effect declared that it had not intended by the provisions for seizure and sale that a seizure of the patent (without more) should operate to seize the accrued royalties under presidential licenses. Knowledge of the precise words used in any instrument of seizure may not, of course, be imputed to Congress. The authority to seize, however, as originally conferred, was accompanied by a provision that such seizure should be evidenced by a written "requirement" and that in the case of patents the requirement should have the force and effect of an assignment. In *Hicks* v. *Anchor Packing Company*, 16 Fed. (2d) 723 the right of the former enemy owner to recover royalties after seizure of the patent was drawn in question. That case ended in the court below, no petition for writ of *certiorari* having been presented to

this court, and thus, while inconclusive cast doubt upon the meaning of the act. The Amendment of 1928, therefore, may properly be regarded as declaratory of the intent of Congress that the provisions governing seizure should be construed, as we think they are required to be on their face, viz., as making the extent of the seizure dependent upon the words of the instrument of seizure, construed, as in the case of the assignment of patents, and hence declaratory of the right of the former enemy owner to maintain suits for the recovery of royalties prior to their seizure and sale, unless expressly seized and sold. So interpreted, the Amendment of 1928 is consistent with the Act in its original form and is constitutional, while otherwise it must be construed as an attempt to divest the purchasers of such royalties of their right thereto, thus giving rise to a serious constitutional question.

II. Petitioners were the owners of the patents within the meaning of that part of Trading with the Enemy Act defining by whom and when suit should be brought.

The owner of the patent upon whom the right to recover royalties was conferred by the Act (10(*f*), pp. 6-8 *supra*), as originally enacted, concededly meant the enemy owner. The court below, following its own prior decision in *Hicks* v. *Anchor Packing Co., supra,* held that the subsequent amendment of section 7 (p. 3 *supra*), permitting seizure, limited such right of recovery to the owner of the patent at the time of the institution of the suit and applied the same rule in the instant case. In this the court below erred. The amendment in question

did not in express terms take away from a former enemy owner the right concededly conferred by the original act to recover the royalties accruing during his period of ownership. Its effect should not be extended beyond that necessary to give full force and effect to the seizure itself. The law governing patents and patent rights recognizes the right of successive owners to recover royalties or damages accruing during their respective periods of ownership and makes such rights dependent not upon ownership of the patent at the time of suit but ownership of the patent at the time of infringement or accrual of the royalties (cases *supra*). The more rational interpretation of the statute in question and the only one consistent with the patent law is that the right to sue for royalties at any time within a year after the end of the war was a right to be successively exercised by successive owners of the patent at the time that the royalties accrued.

If the patents had never been seized it may not be doubted that the enemy owners might, at any time, have assigned their patents to anyone not a citizen of the United States, if not to such a citizen, whether the assignments could be recorded before the termination of the war or not. In such a case it may not be doubted that both the assignor and assignee could maintain suits under this statute for recovery of reasonable royalties under presidential licenses for the periods represented by their respective ownerships of the patent and that each would have been an owner within the meaning of the statute. If the former owner, under such circumstances, could have maintained a suit for the royalties accruing during his period of ownership, although he had parted with the ownership of the patent by voluntary assignment, he may

maintain such a suit although he has involuntarily parted with such ownership by seizure and sale. If the accrued royalties were never seized, to confine the meaning of the word "owner" in the statute to the owner of the patent at the time suit is brought, instead of construing it to mean the owner of the patent at the time the royalties accrued, is to permit the licensee to use the patent free of royalties up to the time of seizure, since it will hardly be contended that the subsequent purchaser of the patent, although not the owner of the accrued royalties, may sue for and recover them. Such a construction is wholly inconsistent with the purpose of the statute and leads to unjust and incongruous results. Such an interpretation should always be avoided. *Kohlsaat* v. *Murphy*, 96 U. S. 153, 160; *United States* v. *Kirby*, 7 Wall. 482; *Hawaii* v. *Mankichi*, 190 U. S. 197.

In *Kohlsaat* v. *Murphy, supra*, this Court said (p. 160) that such results (meaning discrimination, injustice, etc.):

> "should never be imputed to the legislature except when the language employed will admit of no other signification."

There is no such language in this statute.

In *Hawaii* v. *Mankichi, supra*, this Court said (p. 214):

> "Two recent English cases are instructive in this connection: In *Plumstead Board of Works* v. *Spackman*, L. R., 13 Q. B. D. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: 'If there are no means of avoiding such an interpretation of the statute' (as will amount to a

> great hardship,) 'a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended.' See also *Ex parte Walton*, L. R. 17 Ch. D. 746."

In determining the meaning of the word "owner", as used in the Act, consideration should also be given to the amendment thereof by the Settlement of War Claims Act. As stated, the decision of the court below in the *Hicks* case cast doubt upon who was meant by the word "owner" in the Act, as amended by provision for seizure and sale. By this Act Congress obviously intended not to create a new right, or to restore an old one, but to declare that the word "owner" as originally intended, meant the owner at the time the royalties accrued despite subsequent seizure and sale. The amendment was a legislative declaration of the purpose of the statute as it then stood. This legislative interpretation is entitled to great weight. *Cope* v. *Cope, supra; U. S.* v. *Stafoff, supra; U. S.* v. *Morton, supra; Board of Commissioners* v. *Alexander, supra.* It was enacted as a part of the Settlement of War Claims Act, having for its purpose a comprehensive settlement of the various claims of the several governments and their nationals against each other. As a part of such settlement it undertook to make plain the rights of enemy owers to recover royal-

ties, which had accrued prior to seizure of their patents, provided suits therefor had been instituted within a year after the termination of the war in accordance with the provisions of the Trading with the Enemy Act as originally enacted. This intent should not be lightly disregarded. It is believed that the interpretation placed by the court below, upon the original act, as amended by the provision permitting seizure, is plainly erroneous. But, if the matter be involved in doubt that doubt should be resolved in favor of the subsequent interpretation placed upon the act by Congress itself.

III. The Amendment of 1928 was constitutional.

If, as we insist, the accrued royalties were never seized and the right of the former enemy owner to recover the same, as originally conferred, continued after seizure, the Amendment of 1928, being merely declaratory of previous enactments is not unconstitutional. The ruling of the courts below to the contrary proceeds upon the false premise that, although the Act originally conferred upon the enemy owner the right to recover royalties accruing during his period of ownership, he ceased to be the owner within the meaning of that part of the statute specifying by whom and within what period suits should be brought, when the statute was amended so to authorize a seizure of the patents.

Assuming the correctness of the premise, the conclusion does not follow. As distinguished from *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, cited by respondent duPont in its brief in opposition to certiorari, these suits had already been begun at the time of the

passage of the Act on the supposed authority of the statute. The effect of the amendment was, therefore, not to permit a plaintiff, who had allowed the bar of the statute to run, thereafter to bring a suit, but to cure a defect in no wise attributable to the plaintiff in suits already instituted. It is one of that class of cases in which curative statutes passed for the purpose of curing such defects in pending litigation have been sustained. *Danforth* v. *Groton Water Co.*, 178 Mass. 472; *Dunbar* v. *Boston & Providence RR.*, 181 Mass. 383; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271.

In *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, this Court, speaking through Mr. Justice Holmes, cited with approval the doctrine of *Danforth* v. *Groton Water Co., supra*, and *Dunbar* v. *Boston & Providence R. R. Co., supra*, decided by him while Chief Justice of the Supreme Judicial Court of Massachusetts, saying:

> "It is true also that when rights are asserted on the ground of some slight technical defect or contrary to some strongly prevailing view of justice, Courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions, some of which are collected in *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 477; *Dunbar* v. *Boston & Providence R. R. Co.*, 181 Mass. 383, 385. In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine."

The case is also quite similar to *Ewell* v. *Daggs*, 108 U. S. 143, and *West Side Ore Co.* v. *Pittsburgh Con-*

struction Co., 219 U. S. 92. In the former a statute of Texas provided that obligations for the payment of money, providing for a greater rate of interest than 12%, should be void and of no effect so far as recovery of interest was concerned. The defendant borrowed money from the plaintiff at a greater rate than that allowed by the statute. Subsequently the usury statute was repealed. In holding that the plaintiff was not deprived of a vested right by the repeal of the statute the Court said:

> "Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. *Read* v. *Plattsmouth*, 107 U. S. 568; and see *Lewis* v. *McElvain*, 16 Ohio 347; *Johnson* v. *Bentley*, *Ib.* 97; *Trustees* v. *McCaughy*, 2 Ohio State 152; *Satterlee* v. *Mathewson*, 16 S. & R.

169; S. C. in error; 2 Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88.

"The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. *Cooley Constitutional Limitations*, 378, and cases cited."

So in this case duPont assumed an obligation to pay reasonable royalties for the use of the patent under the license voluntarily taken by it and may not be heard to complain if it is held to such obligation by a statute remedying a defect in previously existing statutes on account whereof the former enemy owner had been left without a remedy for the enforcement of such obligation.

In *West Side Ore Co.* v. *Pittsburgh Construction Co., supra*, the plaintiff was a foreign corporation which was not qualified to do business within the State. Under the statute contracts made by such a corporation were voidable. The corporation sued on a contract and the Court held it could not recover thereon. The legislature passed an Act validating such contract. The Supreme Court held the statute constitutional, quoting from *Ewell* v. *Daggs, supra*, a portion of the language hereinbefore set forth.

Moreover, the Settlement of War Claims Act was as much an exercise of the war power as were the statutes passed during the war itself. It had for its purpose the settlement of claims growing out of the war. In *Miller* v. *United States*, 11 Wall. 268, 304, this Court declared that the war powers of the govern-

ment were not affected by the restrictions of the Fifth and Sixth Amendments. This broad statement has since been qualified, *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 156, but it may not be doubted that an act, which would be void under the Fifth Amendment, if not referable to the war power, may be sustained, if referable thereto, *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253. That case involved the constitutionality of the Lever Act as a price fixing statute. Except as an exercise of the war power, such an act of Congress would have clearly violated the Fifth Amendment. Its validity however, as an exercise of the war power was sustained. The rule appears to be that the Fifth Amendment imposes no greater limitation upon the war power than does the Fourteenth Amendment upon the police power of the states, *Hamilton* v. *Kentucky Distilleries Co., supra.* The usual test of the application of the Fourteenth Amendment to the police power is whether the Act in question is arbitrary, or capricious, or involves an unwarranted and unreasonable interference with private rights, having no direct relation to the objects and purposes for which the police power may be exercised. The amendment of 1928 is subject to none of these infirmities. The effect of the decision of the court below is to permit the licensee under licenses granted under Trading with the Enemy Act to escape the payment of any royalties for the use of the patents in question prior to their seizure. By the acceptance of the license it became obligated to pay such royalties. Assuming that the effect of the amendments providing for seizure was to deprive enemy owners of the remedy theretofore afforded for the use of their patents under presidential licenses,

the amendment of 1928 confirming such rights in them, where suits had already been brought in accordance with the statute, is neither arbitrary, nor capricious, nor does it constitute an unreasonable and unwarranted interference with private property, or private rights.

In so far as the constitutional objection raised rests upon an assumed invasion of the property rights of the Chemical Foundation as assignee of the patents, the objection urged is not open to duPont the licensee. *Missouri Rate Cases*, 230 U. S. 474, 508; *Aetna Insurance Company* v. *Hyde*, 275 U. S. 440; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Heald* v. *District of Columbia*, 259 U. S. 114; *Straus* v. *Foxworth*, 231 U. S. 162. Nor were any rights of the Chemical Foundation involved. The royalties were never seized and were never sold to it. Were it otherwise, the Chemical Foundation in its suit asserted no rights to the accrued royalties. Its bill of complaint sought only a recovery of the royalties accruing after the sale to it. No issue was joined between it and petitioner and it was error to include in the decree in its case a finding that it was the owner of the accrued royalties.

Moreover, it is by no means plain that in the exercise of its war power, and as a part of the settlement made of claims growing out of the war, it would have been beyond the constitutional power of Congress to restore to enemy owners the right to royalties, which had accrued under licenses granted *in invitum* by the United States, whatever obligations the United States might be required to assume towards its former assignee of such royalties. It is unnecessary, however, to consider this question further. For the reasons hereinbefore stated, only by a

most strained construction of the original Act and of the instruments of seizure may the amendment of 1928 be interpreted as having had this effect.

IV. It is doubtful whether the right to seize the accrued royalties was ever conferred, a doubt which should be resolved against such authority if necessary to carry out the purpose of Congress to permit enemy owners to recover such royalties up to date of sale.

Under the Trading with the Enemy Act as originally enacted, the President was authorized to require "any money or other property owing or belonging to or held for, by, on account of or for the benefit of an enemy" to be conveyed to the Alien Property Custodian so that it could be brought under Government supervision and would not be employed in activities inimical to the interests of the Government in the prosecution of the war. Section 7(*c*), page 3, *supra*. By Section 12 page 10, *supra* the Alien Property Custodian was empowered only to hold and manage property so conveyed and could sell only to prevent waste. By an amendment to Section 12 of March 28, 1918 (pp. 11 and 12, *supra*) unrestricted power of sale was conferred and the foregoing limitation removed.

Section 7(*c*) was amended November 4, 1918, so as to permit the seizure of

> "any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character

and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of an enemy * * *"

The foregoing language, literally construed, is broad enough to authorize the seizure of the right to the recovery of royalties under presidential licenses prior to the sale of patents seized. The right to the recovery of such royalties was an extraordinary right, totally dissimilar from ordinary choses in action, claims and demands. It was in effect a provision for the making of just compensation for the seizure of the use of the patents, as distinguished from the seizure of the patents themselves, and was made in harmony with the settled policy of this Government to make such compensation to enemy owners for the use of property seized, although not required by the Constitution so to do. Wherever necessary to give effect to the intent of Congress, the meaning of the words employed may be either enlarged or limited in disregard of their literal significance. *Holy Trinity Church* v. *United States,* 143 U. S. 457. In the brief in support of the petition for certiorari authority to seize this right was conceded. Further consideration of the general purposes of the provision in question and of its legislative history lead to the conclusion that it was not intended by this provision to authorize the seizure of this extraordinary right and that the words "choses in action" and "rights and claims of every character", etc., should be restricted in their application to ordinary rights of such description.

As stated by this Court, the purpose of this provision was "not only to weaken enemy countries by de-

priving their supporters of their properties—but also to promote production in the United States of things effective to the successful prosecution of the war." *United States* v. *Chemical Foundation, supra.* Seizure of this right was not necessary to the accomplishment of either of these general purposes. With the seizure of the patent, promotion of production in the United States of the articles covered thereby was fully accomplished, while the right to the recovery of such royalties, being postponed until the conclusion of the war, its seizure was unnecessary to weaken enemy countries.

That the seizure of this extraordinary right to just compensation was not within the purposes in mind at the time of the enactment of this provision seems to be evidenced by the legislative history of the amendment, which was enacted as a rider to the first Deficiency Appropriation Act of 1919 (Ch. 201, Section 1, 40 Stat. 1020). The amendment was not a part of the bill as it passed the House (H. R. 13086, 65th Congress, Second Session). On its receipt in the Senate the bill was referred to the Committee on Appropriations (56 Cong. Rec. Part II, p. 11403, 65th Congress, Second Session) and was added by that Committee as a result of hearings held before it. The amendment was presented to the Committee by Mr. Bradley, the General Counsel for the Alien Property Custodian, who explained its purpose. In so doing he stated that, while Congress had conferred an unrestricted power of sale on the Custodian by the Amendment to Section 12 passed in March, 1918, nevertheless legal opinion feared that patents might not be included in the enemy property which was subject to seizure and sale by the Alien Property Custodian owing to the specific treat-

ment given to patents, copyrights, trademarks and other similar species of property by Section 10 of the Act. He further stated that the Alien Property Custodian found that in the sale of a business it was indispensable to sell the patent with the business (U. S. Appropriations Committee (Senate) Hearings 65th Congress 1-2 Sess., 1917-1918 Miscellaneous; Hearings before the Sub-committee of the Committee on Appropriations, U. S. Senate, H. R. 13086, pp. 81-85). To use the words of Mr. Bradley, "the net result of the patent situation is that we can resell only the plant, and, therefore, only the instrument for infringing on the patent monopoly that must still reside in the German owner during the life of the patent." (Op. Cit. 85).

In speaking of the wording of Section 7(*c*) Mr. Bradley went on to say (Op. Cit. 85):

> "The other changes in the first paragraph 7-c, as amended, are comparatively speaking of minor importance. In addition to patents, we do add the express inclusion of choses in action, and rights and claims of every character and description. That expression is put there by way of excess caution, perhaps, to avoid the possible construction of any limitation on the meaning of the word "property", and also with the further specific thought in mind that it will enable us to reach this situation.
>
> "Just prior to the war, and particularly after the break in diplomatic relations, there were very many transactions by which property then owned by Germans was pretended to be sold to American citizens. The larger part of it was perhaps first incorporated, and then the stock was pretended to be sold; but in very many of those cases

we have also been able to locate strings in the way of options reserved, and the right to repurchase, say in 1920; and where they did sell outright without our being able to secure any evidence of retaking the property, they were cautious to make the purchase price payable about 1920, and in some cases boldly after the end of the war. We also add, in the latter part of this first paragraph, a provision authorizing the Alien Property Custodian to seize—of course, that is mere mechanical machinery—property where he is not able, for any reason, to serve a demand."

The following questions by Senator Underwood and answers by Mr. Bradley bring out clearly the purposes of the Amendment (*Op. cit.* 87-88):

"SENATOR UNDERWOOD: Mr. Bradley, let me ask you this question: The purpose of this amendment covers two general subject matters, *and only two.* One is handling the patent situation so that you can convey the title to the purchaser?

"MR. BRADLEY: Exactly.

"SENATOR UNDERWOOD: The other is largely a question of transfer of stock certificates?

"MR. BRADLEY: That is correct.

"SENATOR UNDERWOOD: And although Congress gave you, or attempted to give you, full power to dispose of enemy-owned property, when you come to investigate and handle the situation you find that the power does not reach far enough to control the patent situation or the transfer of stock certificates that are not in the actual possession of the Alien Property Custodian?

"MR. BRADLEY: That is correct.

"SENATOR UNDERWOOD: *And all you want to do about this amendment is simply to carry out the terms of the original act, and give you the power that is necessary to handle these particular features that are not covered by the general proposition?*

"MR. BRADLEY: *That is a very comprehensive statement of the whole purpose and scope of the amendments.*"

Senator Underwood, speaking on behalf of the Chairman of the Committee, in submitting the Bill to the Senate and in stating its purposes, after reciting the doubt under then existing law as to the power of the Alien Property Custodian to sell enemy owned patents along with the plants in which they were used, said: (56 Cong. Rec. Part II, pp. 11430-11431, [illegible]h Congress, Second Session):

> "In order to accomplish the real purpose of the original trading-with-the-enemy act it is essential, in order that these plants may be sold and a clear title not only to the machinery but to the patent rights be obtained, that the President be given this additional power. That is all there is in the amendment. There are only two things involved: One is the right to sell the shares of the stock that happen to be in the possession of an alien enemy in Germany where the Government does not get actual possession of them, and to sell them on the books; and the other is to give to the Alien Property Custodian, or whomsoever the President may designate, the right to sell the patent rights along with the machinery. It has been represented to the committee that, as a war necessity, this is of very vital importance, especi-

> ally at this immediate time. I think one of the most severe blows that this Government has delivered against the German Empire is that we have taken over alien-enemy property; that we are proceeding to dispose of it, and that we do not propose to allow aliens to continue to do business."

It thus appears that the purpose of the Amendment to Section 7 (*c*) was to resolve any doubts as to the power of the Alien Property Custodian to sell patents and trademarks with the business to which they were appurtenant, to enable the Custodian to pierce the veil of pretended American ownership with which certain Germans had clothed their ownership of property in this country and to seize shares of stock owned by Germans in American companies when the certificates representing such shares were located outside of this country.

By the Amendment of 1928 already noted, Congress evinced a purpose to confirm in former enemy owners the right to just compensation for the use of their patents under presidential licenses prior to their sale as a result of seizure. This purpose should be made effective, if necessary, by so limiting the broad language of the seizure provisions as to eliminate therefrom the authority to seize this extraordinary right, seizure of which does not appear to have been in the mind of Congress, as indicated by the foregoing legislative history of the Act, and was not necessary to effectuate its general purposes.

It is respectfully submitted that the decree of the court below should be reversed.

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